Supreme Court, U.S.
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No.——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GRANTWOOD VILLAGE,
Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
GRANT'S FARM MANOR, INC., and
GATEWAY TRAILNET, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Rails-to-Trails statute, 16 U.S.C. § 1247(d), expressly preempts state law to the extent that it provides for reversion of a railroad's interest in a right-of-way upon conversion to a trail. The question presented, as to which the courts of appeals are in conflict, is:

Whether the authority of the Interstate Commerce Commission over the abandonment of rail service, which is now vested in the Surface Transportation Board, completely preempts state real property law governing the abandonment of a railroad's real property interest in a right-of-way.

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PETITION FOR WRIT OF CERTIORARI

The Town of Grantwood Village respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-10a) is reported at 95 F.3d 654. The order of the United States District Court for the Eastern District of Missouri denying the motion to remand the case to state court (Pet. App. 18a-19a) and the opinion of the district court (Pet. App. 11a-17a) are not reported.

JURISDICTION

The court of appeals entered its judgment on September 9, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Missouri Ejectment Statute, R.S. Mo. § 524.010; the Missouri Quiet Title Act, R.S.Mo. § 527.150; the Rails-to-Trails statute, 16 U.S.C. § 1247 (d); 28 U.S.C. § 1331; and 28 U.S.C. § 1441(a)-(c). These statutes are set out in the appendix. Pet. App. 20a-22a.

STATEMENT

The jurisdiction of the district court was invoked under 28 U.S.C. § 1441(a)-(c) to remove a quiet title action filed in state court. The district court's federal question removal jurisdiction rests on a determination that federal statutes preempt state law governing title to real property and that a state statutory quiet title action is a case "arising under" federal law.

This case is a dispute over real property interests in approximately one acre of land. The Town of Grantwood Village, a Missouri municipal corporation, holds the underlying fee to the property at issue through a series of deeds that trace their origin to President Ulysses S. Grant. By virtue of an 1874 letter from President Grant to his agent, the predecessors of the Missouri Pacific Railroad (MoPac) and the Union Pacific Railroad, constructed tracks on a portion of this property and provided rail service for a long period. In 1992 MoPac filed with the Interstate Commerce Commission (ICC) a notice of intention to abandon railroad service over a portion of the Carondelet Branch, which includes the property in Grantwood Village. MoPac and Gateway Trailnet, a not-for-profit Missouri corporation, subsequently agreed to convert the Carondelet Branch to interim trail use.

In 1993 Grantwood Village filed a quiet title action in state court to resolve the parties' claims to the property. The Village claimed that it was the owner in fee simple because, under state law, whatever interest MoPac had in the property had been abandoned before the 1992 ICC proceeding and that, consequently, MoPac could not convey to Trailnet an interest in real property that it did not own. Trailnet removed the case to federal district court. The court of appeals upheld both the removal and the dismissal of the case on the ground that federal law preempts state law and that "[s]tate law claims can only be brought *after* the ICC has authorized an abandonment and after the railroad has consummated that abandonment authorization." Pet. App. 9a (emphasis in original).

1. *Rails-to-Trails Conversions.* The ICC has had authority to regulate abandonment of railroad service since 1920. See *Hayfield Northern R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 628 (1984) (summarizing history of ICC regulatory authority). In order to abandon rail service, a railroad must obtain a "certifi-

cate of abandonment" from the ICC[1] either by filing a petition for abandonment under 49 U.S.C. §§ 10903-04 or a petition for exemption under 49 U.S.C. § 10505. Beginning in 1983, the ICC has also had authority "to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails." *Preseault v. ICC*, 494 U.S. 1, 6 (1990).

In 1983, Congress amended the National Trails Systems Act (NTSA) and added a provision commonly known as the "Rails-to-Trails" statute, 16 U.S.C. § 1247(d). National Trails System Act Amendments of 1983, Pub. L. No. 98-11, tit. II, § 208(2), 97 Stat. 48 (1983). The "Rails-to-Trails" statute "provides that a railroad wishing to cease operations along a particular route may negotiate with a State, municipality, or private group that is prepared to assume financial and managerial responsibility for the right-of-way." *Preseault*, 494 U.S. at 6-7 (footnote omitted). When a railroad files a petition either for abandonment or for exemption, prospective trail users may communicate with the ICC and indicate their willingness to acquire the right of way. 49 C.F.R. § 1152.29(a). If the railroad is willing to enter an interim trail use agreement, the ICC issues either a Certificate of Interim Trail

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[1] The ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1995), was enacted on December 29, 1995, and took effect on January 1, 1996. The ICCTA recodified the ICC's authority over abandonment of railroad service and transferred its duties to a newly created Surface Transportation Board (STB) in the Department of Transportation, with a savings clause for suits initiated before December 29, 1995. *See* ICCTA §§ 102(a), 204(c)(2), 109 Stat. 822-29, 942.

The court of appeals noted "[t]his administrative change" and concluded that it did not affect its analysis of the case because "the applicable laws have also been amended to apply to the STB." Pet. App. 2a, n.2. The court of appeals decided "for ease of reference [to] continue to refer to * * * the ICC." *Id.* This petition also refers to the ICC and the statutory provisions in effect when the case arose.

Use or Abandonment (CITU) in a regular abandonment proceeding or a Notice of Interim Trail Use or Abandonment (NITU) in an exempt abandonment proceeding. *Id.* § 1152.29(b)(1), (d)(1).

A CITU or an NITU gives the railroad and a prospective trail user 180 days to reach an agreement. *Id.* § 1152.29(c)(1), (d)(1). If the railroad and a prospective trail user reach an agreement, "the land may be transferred to the trail operator for interim trail use," but if the parties do not reach an agreement, then "the railroad may abandon the line entirely and liquidate its interest." *Preseault,* 494 U.S. at 7; see 49 C.F.R. § 1152.29(c)(1), (d)(1). The ICC has described its role in this process as "merely ministerial" and as involving "no more than the processing functions of checking to see that the statute has been properly invoked * * * and setting the negotiation process into motion." Rail Abandonments—Use Of Rights-Of-Ways As Trails—Supplemental Trails Act Procedures, 4 I.C.C. 2d 152, 156 (1987). The ICC defers completely to the railroad and prospective trail users "to determine whether a right-of-way will be converted to trail use." *National Wildlife Federation v. ICC,* 850 F.2d 694, 707 (D.C. Cir. 1988). The ICC's regulations do not make any provision either to determine the nature or extent of the real property interest that the railroad is transferring to a trail operator or to resolve competing claims to ownership of the right-of-way. *See* 49 C.F.R. § 1152.29.

The statute provides that interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). This provision expressly preempts state law to the extent that a railroad's interest in a right-of-way would otherwise revert to fee owners upon conversion to a trail. Under state property law, "many railroads do not own their rights-of-way out-

right," and the railroad's interest in the real property would revert "to the abutting landowner upon abandonment of rail operations." *Preseault*, 494 U.S. at 8. Nonetheless, "Congress [has] prevented property interests from reverting under state law[.]" *Id.* In short, to the extent that state law would provide for reversion of a railroad's interest upon conversion to a trail under the federal statute, state law is preempted. State law, however, still defines the nature and the extent of the real property interests that Congress has prevented from reverting and for which compensation is required under the Tucker Act. *Id.; see id.* 12-17.

2. *The 1992 Interstate Commerce Commission Proceeding.* Early in 1992, MoPac filed a notice of exempt abandonment under 49 C.F.R. §1152.50 for authorization by the ICC to abandon rail service over a portion of the Carondelet Branch including the section in Grantwood Village. Pet. App. 2a-3a. On March 25, 1992, after a request by Trailnet, the ICC issued an NITU and determined that "interim trail use could be implemented" if Trailnet and MoPac reached an agreement within 180 days and that MoPac could abandon the line "if no agreement was reached by that time." *Id.* at 3a. After two extensions, on December 30, 1996, MoPac "agreed to sell its interest in the property to Trailnet for interim trail use." *Id.*

3. *State Court Action and Removal.* On September 7, 1993, Grantwood Village filed a quiet title action against MoPac and Gateway Trailnet in the Missouri Circuit Court under the Missouri Quiet Title Act, R.S.Mo. § 527.150 *et seq.* Pet. App. 20a. Trailnet filed a notice to remove the case to federal court under 28 U.S.C. § 1441(a), (b), (c). Trailnet sought removal on the grounds that the Village's quiet title action included claims or rights of Trailnet that arose under 16 U.S.C. § 1247(d), that the rights of the Village turn on the question whether the right-of-way was abandoned and any

abandonment is a matter of federal law, and that Trailnet's rights are derived from an ICC order under 16 U.S.C. § 1247(d). Grantwood Village filed a motion to remand on the ground that its quiet title action was founded entirely on state law governing title to real property and that any federal question appeared only by way of Trailnet's defense.

While the issue of removal was pending, the Village filed a "First Amended Petition" under the Missouri quiet title statute and requested the court "to ascertain, adjudge and decree the right, title and interest" of the various parties to the property, and it subsequently added two separate counts under the Missouri ejectment statute, R.S.Mo. § 524.010 *et seq.* Pet. App. 20a. On May 9, 1995, the district court denied Grantwood Village's motion to remand. *Id.* at 19a. Magistrate Adelman[2] recognized that "[a] pivotal issue in this case is whether Mo Pac abandoned the property prior to its attempted transfer of interest to Trailnet." *Id.* On the basis of *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), he found that "[t]he ICC has exclusive and plenary authority to rule on decisions to abandon rail lines." *Id.* He held that "federal jurisdiction" was "appropriate" because "the question of whether Mo Pac abandoned the line necessarily involves federal law." *Id.*

4. *The district court's decision.* The Magistrate found that MoPac had "an easement of estoppel under Missouri law" and that MoPac, under Missouri law, could transfer this interest in real property to Trailnet. Pet. App. 15a. He then turned to Grantwood Village's contention that MoPac had lost this "easement when it abandoned the property by ceasing to operate the [railroad line] in 1988 and/or by initiating abandonment proceedings with the

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[2] The parties consented to try their case before the magistrate. Pet. App. 2a, n.1.

ICC." *Id.* He rejected the argument that "MoPac had no easement to convey to Trailnet" on the ground that "federal law preempts consideration of this question under Missouri law." *Id.*

The magistrate concluded that, under *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the ICC's "exclusive and plenary authority to regulate abandonment of service" did "not, in itself, preempt the consideration of the abandonment issue under state law." *Id.* at 16a. Nonetheless, "where * * * the ICC retains jurisdiction over a right-of-way by ordering * * * interim trail use", "federal law prevails" and "the NTSA [National Trails Systems Act] precludes a finding that MoPac abandoned its easement." *Id.* Even if federal law did not preempt state law, MoPac had not "abandoned the easement under Missouri law prior to the transfer of the right-of-way to Trailnet." *Id.* at 16a, n.3.

The magistrate also held that the court did "not have subject matter jurisdiction to consider [Grantwood Village's] arguments regarding the propriety of the ICC's order, the ICC's authority in this case, or the applicability of the [Trails Act]." *Id.* at 16a. He then dismissed the case. *Id.* at 17a. He denied the Village's motion for summary judgment under the Missouri quiet title statute to ascertain and decree the title and interest of the parties in the disputed property, and he granted Trailnet's motion for summary judgment [3] dismissing the case. *Id.*

5. *The court of appeals' decision.* The court of appeals held first that the case was "properly removed from state court." Pet. App. 5a. The court of appeals found that "the question of whether MoPac abandoned the right-of-

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[3] Although the magistrate granted "defendant MoPac's" motion for summary judgment (Pet. App. 17a), he probably intended to grant defendant Trailnet's motion for summary judgment. MoPac had not filed a motion for summary judgment, but Trailnet had filed such a motion.

way necessarily involves federal law" because, under *Kalo Brick*, "the ICC has exclusive and plenary authority to determine whether a rail line has been abandoned." *Id.* at 6a.

After holding that "the district court had general subject matter jurisdiction under 28 U.S.C. § 1331" and that "a remand to state court was not required", the court of appeals then held that "the district court correctly concluded that it did not have jurisdiction to review the ICC's Decision." *Id.* The court of appeals found that the "circuit courts * * * have exclusive jurisdiction [under the Hobbs Act, 28 U.S.C. § 2342(5)] over any action to enjoin, suspend, or determine the validity of an ICC order." *Id.* Having construed the Village's "quiet title" action as "in essence a collateral attack on the ICC's order authorizing interim trail use on the right-of-way," the court of appeals held that "[t]he Village's attacks on the ICC's Decision are, therefore, foreclosed because the Village failed to make these arguments to the ICC and failed to file a petition for judicial review within sixty days." *Id.* at 5a, 6a-7a. Thus, "the Village has waived any challenge to the validity of the ICC's order." *Id.* at 7a. The court of appeals specifically found that certain "arguments should have been presented to the ICC and in a petition directly to us challenging the ICC's Decision" and held that "the Village has waived these arguments." *Id.* at 10a.

Finally, the court of appeals turned to the Village's state law claims that "MoPac had only a nontransferable license and that it abandoned this interest when it stopped using the right-of-way." *Id.* at 7a. The court of appeals rejected the Village's state law contention that MoPac's only interest in the right-of-way was a nontransferable license and upheld the district court's determination that "Trailnet received a valid real estate interest from MoPac under Missouri law." *Id.* The court of appeals then determined that federal law, not state law, governs the question whether MoPac had abandoned its interest in the

right-of-way. *Id.* at 7a-8a. "[A]gain guided" by *Kalo Brick* and "by the principle of plenary, pervasive, and exclusive" ICC authority to determine abandonments, the court of appeals held that "federal law preempts state law on the question of abandonment while the ICC retains jurisdiction over the right-of-way." *Id.*

Turning to "the applicable federal law," the court of appeals first held on the basis of the express language of the Rails-to-Trails statute, 16 U.S.C. § 1247(d), that "the ICC's authorization of interim trail use in its Decision precludes a finding of abandonment of the right-of-way under state law." *Id.* at 9a. The court of appeals then held that federal law preempts the Village's state law claim "that MoPac's abandonment predates the Trails Act's application." *Id.* The court of appeals held in effect that federal law preempts state law at all times prior to an ICC authorization of abandonment: [4] "[s]tate law claims can only be brought *after* the ICC has authorized an abandonment" and "MoPac could only have abandoned its right-of-way, even prior to the Trail Act's application, if the ICC made such a determination, which it has not done in this case." *Id.* (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS DIRECTLY WITH AN *EN BANC* DECISION OF THE FEDERAL CIRCUIT

The Court of Appeals for the Eighth Circuit upheld removal and dismissal of state law quiet title and ejectment actions on the ground that "federal law preempts state law on the question of abandonment while the ICC retains jurisdiction over the right-of-way" and that "[s]tate law claims can only be brought *after* the ICC has authorized an abandonment." Pet. App. 7a-8a, 9a (emphasis in orig-

[4] The court of appeals also noted that even if Missouri law was not preempted, state law did not support the conclusion that MoPac had abandoned its right-of-way. Pet. App. 9a, n.5.

inal). The Eighth Circuit's holding that federal law completely preempts state property law prior to ICC authorization of abandonment of rail service is in square conflict with an *en banc* decision of the Federal Circuit holding that state law defines property rights in land used as a railroad right-of-way.[5] *Preseault v. United States*, Nos. 93-5067, 93-5068, 1996 WL 647889 (Fed. Cir. Nov. 5, 1996).

The Federal Circuit's decision is the product of this Court's 1990 judgment upholding the Rails-to-Trails statute. *Preseault*, 494 U.S. 1. This Court recognized that the federal statute preempts state law to the extent that a railroad's interest in a right-of-way would otherwise revert to fee owners upon conversion to a trail. 494 U.S. at 8. It held that when a railroad right-of-way is converted to a trail, the owners of the underlying fee simple interest may

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[5] The court of appeals' statement that the Village's "quiet title" action was "in essence a collateral attack on the ICC's order authorizing interim trail use on the right-of-way" does not in any sense undermine this direct conflict with the decision of the Federal Circuit. Pet. App. 5a. The Village concedes that it waived any arguments challenging the validity of the ICC's order issuing a NITU and authorizing interim trail use if MoPac and Trailnet reached an agreement. Although it is true that these arguments "should have been presented to the ICC" and that "the Village has waived these arguments," *id.*, the Village's quiet title action is not a matter that could have been presented to the ICC. The ICC did not have (and the STB does not have) any authority to determine the nature, location, or extent of the parties' ownership interest in real property. *See* 49 C.F.R. § 1152.29. Thus, the Village could not have "waived" an argument that it could not have presented to the ICC, and a state law proceeding to address a matter beyond the authority of the ICC can hardly be viewed as a collateral attack on an ICC decision.

Even if the court of appeals did view the Village's argument about ownership of the fee simple interest as a "collateral attack," this conclusion conflicts directly with the Federal Circuits' conclusion in *Preseault* that determination of the state law issue of abandonment of title to real property does not involve any challenge to the ICC's plenary authority to regulate rail service. 1996 WL 647889 at *27.

have a remedy in the Court of Federal Claims for a taking. 494 U.S. at 9-17. Three members of the Court wrote separately to express their view that "state law creates and defines the scope of the reversionary or other real property interests affected by the ICC's actions" and that state law governs the question "whether [holders of the underlying fee] possess the property interest that they claim has been taken." 494 U.S. at 21 (O'Connor, J., joined by Scalia and Kennedy JJ., concurring). The Court of Federal Claims subsequently denied compensation, and the fee holders appealed to the Court of Appeals for the Federal Circuit. *See Preseault*, 1996 WL 647889 at *1.

On that appeal, the Federal Circuit in *Preseault* addressed the same issue as the Eighth Circuit. The fee holder in *Preseault*, whose property had been subject to an easement for railroad use, contended that under Vermont law the railroad had abandoned its easement in 1975, more than ten years before the ICC approved the conversion of the railroad right-of-way to a recreational trail under the Rails-To-Trails statute. *Id.* at *18-*23. Grantwood Village made exactly the same argument in this case. The Village argued that, under Missouri real property law, MoPac abandoned any interest that it had in the right-of-way in 1988, more than three years before the 1992 ICC proceeding and conversion to interim trail use.

After a panel decided, consistent with the judgment of the Eighth Circuit, that "federal transportation law preempts [state] law," the Federal Circuit took the case en banc to decide the issue whether federal or state law defined property rights. 1996 WL 647889 at *28. The nine judges who sat en banc divided in their interpretation of Vermont law, but they all agreed that abandonment turns on state law.[6] *See id.* at *18-*23, *28, *32, *34-*43. In

[6] The Federal Circuit was forced to decide state law issues that it recognized should be resolved by the state courts. *Preseault*, 1996 WL 647889 at *5 (Plager, J., joined by Rich, Newman, and Michel, JJ.) The plurality noted that "[i]deally" the state law issues raised

direct conflict with the Eighth Circuit, *Preseault* held that state law governs the question of abandonment of a railroad's interest in a right-of-way and that the railroad had abandoned its easement in 1975. *Id.* at *18-*23. The Federal Circuit then held that there was a "taking" when the ICC approved the rails-to-trails conversion in 1986 because "there was as a matter of state law no railroad easement in existence." *Id.* at *25. It remanded the case to the Court of Federal Claims for a determination of just compensation.[7] *Id.* at *1.

The question whether federal law or state law governs real property interests prior to ICC authorization of abandonment of rail service and/or conversion to trail use extends beyond the direct conflict between the Eighth Circuit and the Federal Circuit. The highest courts of two states have held, consistent with the judgment of the Eighth Circuit in this case, that state courts cannot hear a state law action to determine whether a railroad has abandoned its interest in a right-of-way. *Trustees of the Diocese of Vermont v. State*, 496 A.2d 151 (Vt. 1985);

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by competing claims to real estate should "be decided by the State of Vermont's courts, utilizing their knowledge of and experience with their state's property law." *Id.* The state courts, however, had previously declined to address the question of the state law rights of competing claimants to the right-of-way, and Vermont law makes no provision for certification of state law issues to the state courts. *Id.*; *see id.* at *44. Unlike the Vermont state courts, the Missouri courts never had an opportunity to resolve the state law claims of Grantwood Village, or of MoPac and its successor Trailnet, because the case was removed to the United States district court.

[7] The fee holder in *Preseault* also argued, in the alternative, that if the railroad had not abandoned its easement in 1975, the easement as a matter of state law was not broad enough to encompass use as a recreational trail. The Federal Circuit held that under Vermont law the easement was not broad enough to encompass use as a recreational trail and that, if the easement was still in existence in 1986 when the right-of-way was converted to a trail, the fee holders were also entitled to compensation on this second ground. 1996 WL 647889 at *13-*18, *25.

Mobile & Gulf Railroad Co. v. Crocker, 455 So.2d 829 (Ala. 1984). The Court of Appeals for the District of Columbia has also stated a position consistent with the Eighth Circuit and in conflict with the Federal Circuit. *National Wildlife Federation v. ICC,* 850 F.2d 694 (D.C. Cir. 1988). In the course of reviewing the ICC's final rules implementing the Rails-to-Trails statute, the court of appeals noted that "a right-of-way may be transferred or extinguished under state law" only after the ICC has issued an abandonment certificiate. *Id.* at 704; *see also Louisiana & Arkansas Ry. Co. v. Bickham,* 602 F.Supp. 383, 384 (M.D. La.), *aff'd,* 775 F.2d 300 (5th Cir. 1985) (no state law reversion of right-of-way prior to ICC authorized abandonment of rail service).

Review of the Eighth Circuit's judgment is necessary to resolve the direct conflict with the Federal Circuit and to settle the important question whether, as the Eighth Circuit held, federal law preempts state property law completely until after the ICC authorizes abandonment of rail service.

II. THE COURT OF APPEALS' DECISION CONFLICTS IN PRINCIPLE WITH THIS COURT'S PREEMPTION DECISIONS

This Court, in a unanimous decision, recently restated the framework for analysis of preemption issues. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 115 S. Ct. 1671 (1995). The Court addresses "claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *Travelers,* 115 S.Ct. at 1676 (citations omitted). "[W]here federal law is said to bar state action in fields of traditional state regulation," such as real property, the Court proceeds on the " 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Travelers,* 115 S.Ct. at 1676 (*quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230

(1947)). "[P]re-emption claims turn on Congress's intent" so the Court "begin[s] * * * with the text of the provision in question" and then "move[s] on, as need be, to the structure and purpose" of the statute. *Travelers*, 115 S.Ct. at 1677 (citations omitted).

The court of appeals did not follow any part of this framework. *See* Pet. App. 7a-9a. Without considering the text of any federal statute,[8] the court of appeals concluded that "federal law preempts state law on the question of abandonment while the ICC retains jurisdiction over the right-of-way" and that "[s]tate law claims can only be brought *after* the ICC has authorized an abandonment." Pet. App. 7a-8a, 9a (emphasis in original). The court of appeals did not take into account the presumption against preemption or make any finding that preemption of state law was the clear and manifest purpose of Congress. Even though this Court held last term, in a case addressing an analogous issue of preemption of state common law claims, that " '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case," *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2250 (1996) (citations omitted), the court of appeals did not address the issue of congressional intent to preempt state quiet title and ejectment actions.

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[8] The Village contends that under state law the railroad abandoned its interest in the right-of-way prior to the 1992 ICC proceeding, and the court of appeals did not invoke the Rails-to-Trails statute, 16 U.S.C. § 1247(d), or any other specific federal statute to support its conclusion that "federal law" preempts state law prior to an ICC abandonment proceeding and possible conversion to a trail. *See* Pet. App. 9a. The court of appeals did quote section 1247(d) in support of its determination that neither the 1992 ICC abandonment proceeding nor the trails conversion triggered reversion of any real property interest to the Village. Pet. App. 8a. The Village recognizes, however, that section 1247(d) expressly preempts any claim that either the 1992 ICC abandonment proceeding or the conversion of the right-of-way to a trail triggers reversion under state law.

Instead of applying this Court's preemption criteria, the court of appeals cited two cases recognizing the ICC's broad authority to regulate abandonment of railroad service and concluded that state law was preempted.[9] Pet. App. 9a (*citing Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Colorado v. United States*, 271 U.S. 153 (1926)). In deciding that "federal law" preempts state quiet title and ejectment actions, the Eighth Circuit ignored the fact that the term abandonment is used in two senses: (1) "the abandonment of rail *service* pursuant to order of the [ICC]" and (2) "the relinquishment of title to property." *Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158, 1159 (7th Cir. 1992) (emphasis in original).

This Court has upheld Congress' power under the commerce clause to authorize abandonment of rail service on an intrastate line. *Colorado v. United States*, 271 U.S. 153 (1926). This Court has also held that a state cannot impose damages in a civil action against a railroad for conduct, abandonment of rail service, authorized by the ICC. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The court of appeals, however, did not provide any explanation, either on the basis of the text of any federal statute or in terms of congressional intent, why this federal authority to regulate rail service extends to preemption of state law governing title to real estate.

III. THE FEDERALISM ISSUES PRESENTED ARE IMPORTANT

The court of appeals' holding that "federal law" preempts state real estate law diminishes the states' traditional

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[9] The court of appeals subsequently noted a third case, *Hayfield Northern R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622 (1984). Pet. App. 9a. This Court's recognition in *Hayfield* that state law governs the disposition of railroad property after the ICC authorizes abandonment of rail service does not automatically lead to the court of appeals' conclusion that state law governing property disputes is preempted at all times before action by the ICC.

authority to resolve property disputes. It raises three imporant federalism issues: (1) whether such a fundamental reordering of state and federal power is the responsibility of Congress or of the federal courts; (2) whether state remedies should be preempted where federal law provides no comparable or alternative remedy; and (3) whether preemption should provide a basis for federal question jurisdiction over state quiet title and ejectment actions. Resolution of these issues and of the conflict between the courts of appeals is an important national matter because there are about 141,000 miles of track in use and approximately 3,000 miles are abandoned every year. *See Preseault*, 494 U.S. at 5.

An unambiguous expression of congressional intent to displace state law is an essential means of protecting the States' role in our federal system. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The presumption against preemption and the corollary requirement that Congress demonstrate its preemptive purpose clearly and unambiguously are grounded on fundamental "principles of federalism," *see Department of Revenue of Oregon v. ACF Industries*, 510 U.S. 332, 343-344 (1994), and they serve the vital "interest of avoiding unintended encroachment on the authority of the States." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Thus, the court of appeals' decision in this case to preempt state real property law, in the absence of any evidence of congressional intent, raises an important issue whether such changes in "the usual constitutional balance of federal and state powers" are properly a judicial function. *Gregory*, 501 U.S. at 460.

In addition to this judicial reordering of state and federal powers, preemption of state real property law leaves individuals who have competing claims to interests in real property burdened by a railroad right-of-way without any means of resolving their dispute. Preemption of state quiet title and ejectment actions eliminates the only means of resolving property disputes and establishing boundary

lines because federal law does not provide any substitute for the state law actions that it preempts. The court of appeals' decision that "[s]tate law claims can only be brought *after* the ICC has authorized an abandonment," Pet. App. 9a (emphasis in original), completely denies property owners their traditional state law mechanisms to clarify property rights, to resolve property disputes, and to establish boundary lines until the ICC authorizes abandonment of rail service.

In this case, for example, the federal court's decision after removal was not a complete substitute for the state quiet title action. Under Missouri law, state courts in a quiet title action must make specific findings about the nature and extent of the parties' interests in the disputed property and must determine the boundaries of the disputed property. *See e.g., Patterson v. Null,* 751 S.W.2d 381, 388 (Mo. App. 1988); *Calvert v. Latimer,* 670 S.W.2d 588, 590 (Mo. App. 1984). The state courts would also have decided the issue whether the railroad, prior to the 1992 ICC proceeding, had relinquished or abandoned its interest under state law in the right-of-way. Finally, if the state courts had decided that the railroad had not abandoned its interest in the right-of-way, then they would have considered the claim that the right-of-way actually occupied only 15 to 20 feet of the property and would have determined the size and precise location of the easement. *See Patterson,* 751 S.W.2d at 388. Although the district court found that the railroad had "an easement of estoppel under Missouri law" and that federal law preempted any state law claim that the railroad had abandoned its easement, it did not determine the location of this easement, and, instead, dismissed the case. Pet. App. 15a, 16a-17a.

The court of appeals' judgment affirming the dismissal of the quiet title and ejectment actions creates a significant practical problem. Grantwood Village has no means of establishing the boundaries of the railroad right-of-way

that has been banked and put to interim use as a trail. Given this Court's reluctance to hold that state common law remedies are preempted where federal law provides no comparable or alternative remedy, the court of appeals' decision that state statutory provisions for judicial resolution of property disputes are preempted raises a substantial federalism issue. *See Medtronic,* 116 S.Ct. at 2251; *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984).

Finally, the court of appeals' decision that "federal law" preempts state real property law marks a major expansion of federal question jurisdiction over real property issues traditionally governed by state law. Federal courts have "jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 27-28 (1983). Under this settled test of federal question jurisdiction, the district court could not hear the case originally or by removal because state law creates the cause of action and because there is no federal law issue present in the state quiet title and ejectment actions. An issue of federal law, Trailnet's claim to the railroad right-of-way under the Rails-to-Trails statute, appears only as a defense to these state law claims.

Nonetheless, the court of appeals found that "the district court had general subject matter jurisdiction under 28 U.S.C. § 1331" and that "a remand to state court was not required." Pet. App. 6a. It then affirmed the district court's decision of a state law issue—the nature of the railroad's interest in the right-of-way under Missouri law. *Id.* at 10a. The court of appeals did not explain directly how state quiet title and ejectment actions "arise under" federal law, but it did state that "federal jurisdiction is

proper" because the question of abandonment "necessarily involves federal law." *Id.* at 6a. This statement may be an oblique explanation of federal question jurisdiction over state law issues under the complete preemption doctrine.[10] Federal courts can exercise federal question jurisdiction "if federal law does not merely provide a defense to a state-created claim but instead has taken over an entire subject matter and made it inherently federal." Wright, Miller, & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3562, at 46 n. 59 (2d ed. 1984). This explanation of federal jurisdiction to decide state property law issues as matters "arising under" federal law, however, raises significant questions about Congress' intent to preempt state law that the court of appeals left unexamined and that warrant careful consideration by this Court.

Resolution of all of these important federalism issues—and a decision rejecting preemption—is necessary in order to ensure orderly implementation of the Rails-to-Trails statute. The Federal Circuit held that state law governs the question of abandonment of a railroad's interest in a right-of-way. 1996 WL 647889 at *18-23. The Eighth Circuit held that "federal law preempts state law on the question of abandonment while the ICC retains jurisdiction over the right-of-way" and that "[s]tate law claims can only be brought *after* the ICC has authorized an abandonment." Pet. App. 9a (emphasis in original). Review of the Eighth Circuit's judgment will provide this Court with an opportunity to resolve this direct conflict and to define the limits of federal authority to preempt state real property law.

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[10] Federal question jurisdiction in this case might also be explained on the ground that Congress enacted legislation regulating abandonment of railroad service and that federal jurisdiction over the separate issue of abandonment or relinquishment of title is necessary to protect the federal regulatory program. This Court, however, has never accepted such a "protective jurisdiction" theory. *See Mesa v. California*, 489 U.S. 121, 137 (1989).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 9, 1996

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3588

GRANTWOOD VILLAGE,
Appellant,

v.

MISSOURI PACIFIC RAILROAD COMPANY;
GATEWAY TRAILNET, INC.;
GRANT'S FARM MANOR, INC.;
UNION PACIFIC RAILROAD COMPANY,
Appellees,

RAILS TO TRAILS CONSERVANCY,
Amicus Curiae.

Submitted: April 10, 1996
Filed: September 9, 1996

Before BOWMAN, BEAM, and MURPHY, Circuit Judges.

BEAM, Circuit Judge.

This case involves a dispute over the conversion of a railroad right-of-way into a trail system under the National Trail Systems Act (Trails Act). Grantwood Village

(the Village) appeals the district court's order [1] granting summary judgment to the defendants. For reversal, Grantwood makes two broad arguments: (1) the district court did not have jurisdiction over this dispute involving rights to real property under Missouri law; and (2) even if the district court had jurisdiction, Gateway Trailnet, Inc. (Trailnet) does not have a valid interest in the property. We affirm.

I. BACKGROUND

The origin of this dispute derives from a letter dated April 6, 1872, in which President Ulysses S. Grant authorized his St. Louis agent, Charles W. Ford, to grant Pacific Railroad Company (Pacific) a right-of-way over his land outside of St. Louis, Missouri. Later in 1872, Pacific constructed its Carondelet Branch across this property. There is no recorded easement or other indicia of title from President Grant to Pacific.

Missouri Pacific Railroad Company (MoPac), Pacific's successor in interest to the right-of-way, provided railroad service to customers on the Carondelet Branch until approximately 1987, at which time the line was used for other types of railroad service. In June 1991, MoPac's parent company, Union Pacific, decided to proceed with abandonment of the Carondelet Branch. Thus, in early 1992, MoPac filed notice with the Interstate Commerce Commission (ICC)[2] pursuant to 49 C.F.R. § 1152.50,

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[1] The Honorable Terry I. Adelman, United States Magistrate Judge for the United States District Court for the Eastern District of Missouri. The parties consented to try their case before Magistrate Adelman pursuant to 28 U.S.C. § 636(c).

[2] As of January 1996, the ICC was abolished as a separate agency and its functions have been taken over by the Surface Transportation Board (STB) in the Department of Transportation. This administrative change, however, does not affect our analysis in the present case because the applicable laws have also been amended to apply to the STB. Therefore, for ease of reference we continue to refer to the entity as the ICC throughout this opinion.

seeking exemption from other applicable federal laws governing the procedures for abandonment of any part of a railroad line (set out in 49 U.S.C.A. §§ 10903 & 10904 (West Supp. 1996)). MoPac's request for abandonment and discontinuance of operations over 6.2 miles of the Carondelet Branch included the portion of the right-of-way now in question. On February 28, 1992, a Notice of Exemption was served and published in the *Federal Register*. This Notice of Exemption was to become effective on March 29, 1992.

Prior to publication of the notice, Trailnet asked the ICC to issue a Notice of Interim Trail Use or Abandonment (NITU) pursuant to ICC regulations (49 C.F.R. § 1152.29) adopted to implement the applicable portion of the Trails Act. *See* 16 U.S.C.A. § 1247(d) (West Supp. 1996). MoPac expressed its willingness to negotiate with Trailnet for interim trail use by filing a letter with the ICC.

On March 25, 1992, the ICC issued its Decision and NITU (Decision), in which it reopened proceedings and stated that the Notice of Exemption published in the *Federal Register* on February 28 was modified as necessary to implement interim trail use under the Trails Act. The ICC further stated in its Decision that interim trail use could be implemented if, within 180 days from the date of service of the Decision, an agreement was reached. The Decision also provided that if no agreement were reached by that time, MoPac could abandon that line. Subsequently, the ICC granted two extensions of the 180-day negotiation period at the request of the parties.

On December 30, 1992, one day before time was to expire under the extensions, MoPac and Trailnet entered into a "Donation, Purchase and Sale Agreement" (Agreement) under which MoPac agreed to sell its interest in the property to Trailnet for interim trail use. MoPac contemporaneously executed and delivered a quitclaim deed to Trailnet. The Agreement expressly stated that it

did not merge into the deed, thereby surviving the closing and transfer of title. The Agreement also expressly stated that its terms and the transfer were subject to the provisions of the Trails Act and applicable ICC orders. Upon transfer of the property, MoPac removed its rails and ties. Trailnet made improvements and has maintained the property for trail use.

The right-of-way in question is located on real property adjacent to lots in a village subdivision. The Village has been using portions of this property as a parkway and bird sanctuary. The Village originally filed a single-count quiet title action in state court against MoPac and Trailnet. MoPac answered by stating that it no longer had any interest in the property because it had been transferred to Trailnet. In its first amended petition, the Village sought a declatory judgment regarding the rights of the parties in the property at issue. Specifically, the Village requested a declaration that it is the fee simple absolute owner of the real property. The Village also sought ejectment of Trailnet, Grant's Farm Manor, Inc.,[3] and another party subsequently dismissed from the case. Trailnet had the case removed to federal district court on the basis that the first amended petition includes rights of Trailnet arising under the laws of the United States—i.e., the Trails Act. The district court denied the Village's motion to remand the case back to state court.

Both Trailnet and the Village filed cross-motions for summary judgment. The district court denied the Village's motion but granted summary judgment to MoPac and Trailnet. The court concluded that under Missouri law, Pacific had acquired an easement by estoppel, which had passed to MoPac and eventually to Trailnet. The court rejected the Village's contention that any right held by

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[3] The Village added Grant's Farm Manor, Inc.—the fee title—holder to property south of the disputed railroad right-of-way—as a named defendant in the event that entity could claim some interest in the property at issue.

MoPac had been abandoned for railroad purposes, holding that the ICC had retained jurisdiction over the right-of-way by authorizing interim trail use and that federal law preempts state law on the question of abandonment. Finally, the district court concluded that it lacked jurisdiction to review an ICC order. The Village now appeals to this court.

On appeal, the Village asserts that federal courts lack subject matter jurisdiction to hear this dispute because it involves rights to real property under Missouri law. Thus, according to the Village, this case should be remanded to state court. The Village also argues that Trailnet does not have an interest in the property under Missouri law.

II. DISCUSSION

We review a grant of summary judgment de novo and apply the same standards as the district court. *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 795 (8th Cir. 1996). Summary judgment is appropriate if the pleadings and other evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We give the nonmoving party the benefit of every inference drawn from the evidence. *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359 (8th Cir. 1993).

We are first called upon to determine whether the district court erred in determining that this case was properly removed from state court. We conclude that it did not. Although the Village attempts to characterize this lawsuit as a "quiet title" action, it is in essence a collateral attack on the ICC's order authorizing interim trail use on the right-of-way. Trailnet received MoPac's interest pursuant to a quitclaim deed and Agreement executed in compliance with the ICC's Decision and NITU. Thus, a challenge to Trailnet's interest in the right-of-way necessarily includes a review of the ICC's Decision. Moreover, the Village's attempt to prevent the preservation of the

railroad right-of-way necessarily entails a finding that MoPac abandoned the right-of-way at some point in time. Because the ICC has exclusive and plenary authority to determine whether a rail line has been abandoned, *see, e.g., Chicago & N.W. Transp. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981), the question of whether MoPac abandoned the right-of-way necessarily involves federal law. *See id.*; *see also* 28 U.S.C. § 1331. Therefore, federal jurisdiction is proper and the district court did not err in refusing to remand this case to state court. *See* 28 U.S.C. § 1441(b).

Although the district court had general subject matter jurisdiction under 28 U.S.C. § 1331 and a remand to state court was not required, a separate question arises as to whether the district court had jurisdiction to review a lawsuit challenging, in effect, the validity of an ICC order.[4] Pursuant to the Hobbs Act, circuit courts (other than the Federal Circuit) have exclusive jurisdiction over any action to enjoin, suspend, or determine the validity of an ICC order. 28 U.S.C. § 2342(5). No other court would have jurisdiction to review an ICC decision such as the one in this case. *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 320 (8th Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). Therefore, the district court correctly concluded that it did not have jurisdiction to review the ICC's Decision.

Although the Village could have challenged the ICC's Decision by filing a petition directly in this court, they failed to do so. The Village's attacks on the ICC's Decision are, therefore, foreclosed because the Village failed

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[4] Complaints originally filed in state court opposing, either directly or indirectly, the continued use of a railroad right-of-way under the Trails Act are routinely removed to federal court, even though the district court goes on to hold that it lacks jurisdiction to review an ICC order. *See, e.g., Schneider v. Union Pac. R.R.*, 864 F. Supp. 120 (D. Neb. 1994); *Victor Oolitic Stone Co. v. CSX Transp., Inc.*, 852 F. Supp. 721 (S.D. Ind. 1994).

to make these arguments to the ICC and failed to file a petition for judicial review within sixty days of the ICC's decision of March 25, 1992, as required by the Hobbs Act. 28 U.S.C. §§ 2341 et seq.; *see also* 28 U.S.C. § 2321. Therefore, the Village has waived any challenge to the validity of the ICC's order.

Even after reviewing the Village's contentions, we find them to be without merit. The Village contends that neither MoPac nor Trailnet have an interest in the right-of-way. Specifically, the Village asserts that under Missouri law MoPac only had a nontransferable license and that it abandoned this interest when it stopped using the right-of-way.

We turn first to the question of what interest Trailnet has in the Carondelet right-of-way under Missouri law. The Village argues that the right-of-way was only a license and as such it was not transferable to Trailnet. We recognize that state law defines the nature of the property interest. In this case, a railroad used the right-of-way for over one-hundred years, undoubtedly incurring significant expenses in doing so. President Grant's letter clearly gave MoPac's predecessor in interest a right-of-way across his property. If the interest in the right-of-way had been only a personal, nontransferable license, then it is curious how the license passed from the original grantee (Pacific) to its successors in interest. Therefore, we agree with the district court that Trailnet received a valid real estate interest from MoPac under Missouri law. *See Allee v. Kirk,* 602 S.W.2d 922, 924-25 (Mo. Ct. App. 1980) (citing *Sanford v. Kern,* 122 S.W. 1051 (Mo. 1909)).

The Village next contends that MoPac abandoned any interest it had in the right-of-way. We are again guided by the principle that the ICC's determination of abandonment is plenary, pervasive, and exclusive of state law. *See Colorado v. United States,* 271 U.S. 153, 164-65 (1926); *Kalo Brick & Tile,* 450 U.S. at 323. Therefore, federal law preempts state law on the question of abandon-

ment while the ICC retains jurisdiction over the right-of-way. Accordingly, we must next examine the applicable federal law.

In 1968, Congress enacted the Trails Act in order to establish a national system of nature trails. *See Glosemeyer,* 879 F.2d at 318. By the early 1970s, Congress had become concerned about the abandonment of railroad rights-of-way. *Id.* (referring to the Railroad Revitalization and Regulatory Reform Act of 1976, § 809, Pub. L. No. 94-210, Title VIII, 90 Stat. 144 (codified as amended at 49 U.S.C. § 10906)). One of the major impediments to preserving these rights-of-way existed in state property laws which prescribed that once rail service is discontinued after the ICC's approval of abandonment, such easements would automatically expire and the rights-of-way would revert to adjacent property owners. *Id.* In response to this problem, Congress enacted the Trails Act Amendments of 1983. These amendments included a section that expressly dealt with the question of abandonment. Specifically, this section provides:

> Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, *such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way* for railroad purposes.

16 U.S.C.A § 1247(d) (emphasis added). Congress determined that interim trail use was to be treated like discontinuance rather than as an abandonment. *Preseault v. Interstate Commerce Comm'n,* 494 U.S. 1, 8 (1990).

Therefore, the ICC's authorization of interim trail use in its Decision precludes a finding of abandonment of the right-of-way under state law. *See, e.g., Preseault v. Interstate Commerce Comm'n*, 853 F.2d 145, 150 (2d Cir. 1988), *aff'd*, 494 U.S. 1 (1990).[5]

The Village next argues that MoPac's abandonment predates the Trails Act's application. Even prior to enactment of the Trails Act, the ICC had exclusive jurisdiction to deem a railroad right-of-way abandoned. *See, e.g., Colorado*, 271 U.S. at 164-65; *Kalo Brick & Tile*, 450 U.S. at 319-20. State law claims can only be brought *after* the ICC has authorized an abandonment and after the railroad has consummated that abandonment authorization. *See, e.g., Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 635 (1984).[6] Therefore, MoPac could only have abandoned its right-of-way, even prior to the Trail Act's application, if the ICC made such a determination, which it has not done in this case.

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[5] Even if we examine Missouri law, we nevertheless conclude that state law does not mandate a conclusion that the right-of-way has been abandoned. *See Kansas City Area Transp. Auth. v. 4550 Main Assocs., Inc.*, 742 S.W.2d 182, 191 (Mo. Ct. App. 1987), *cert. denied*, 484 U.S. 1063 (1988). In the present case, the facts indicate that the right-of-way was used for customer service until about 1987, at which time it was used for other types of railroad services until early 1992. This use of the right-of-way contradicts a finding of abandonment, even under state law, prior to 1992 at which time the Trails Act was in effect.

[6] A recent decision by the D.C. Circuit does not affect our analysis. In *Fritsch v. Interstate Commerce Comm'n*, 59 F.3d 248 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1262 (1996), the court held that a railroad could abandon its property interest after the ICC issued a decision permitting abondonment but prior to the expiration of a 180-day public use condition under 49 U.S.C. § 10906, thereby ending the ICC's jurisdiction over the property. Unlike the *Fritsch* case, MoPac did not repeatedly express its clear intent to abandon the right-of-way after the ICC issued its Decision; rather, MoPac expressed willingness to negotiate with Trailnet. Moreover, under the Trails Act, the right-of-way could not have been abandoned during a period of interim use.

Lastly, the Village attacks the validity of the ICC's Decision on several other grounds. The Village asserts that the Trails Act is inapplicable in this case because the quitclaim deed did not expressly reserve a reversionary interest in MoPac. Moreover, according to the Village, the ICC's Decision is void because the 180-day period lapsed before an agreement was reached between MoPac and Trailnet. As noted above, these arguments should have been presented to the ICC and in a petition directly to us challenging the ICC's Decision. Therefore, the Village has waived these arguments. Nevertheless, the plain language of the Agreement demonstrates that both it and the quitclaim deed were drafted in order to comply with the reversionary interest requirement in the Trails Act. *See* 16 U.S.C. § 1247(d). The ICC, moreover, was free to extend this time period for an agreement as it did in this case. Therefore, we find these arguments meritless.

III. CONCLUSION

For the reasons discussed above we conclude that the district court did not err in granting summary judgment to MoPac and Trailnet. Accordingly, we affirm the district court's order and deny all pending motions.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

[Filed Sept. 13, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV302 TIA

GRANTWOOD VILLAGE,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter is before the undersigned on the parties' cross Motions for Summary Judgment [1] and defendant Trailnet's Motion for Sanctions. The parties consented to try their case before the undersigned pursuant to 28 U.S.C. § 636(c).

BACKGROUND

In a letter dated April 6, 1872, Ulysses S. Grant, then owner of the property at issue in this case, authorized his St. Louis agent, Charles W. Ford, to grant Pacific Railroad Company ("Pacific") a right of way on his land. Pursuant to that agreement, Pacific Railroad constructed its Carondelet Branch across the property later that year. There is no recorded deed of easement or other title from Grant to Pacific.

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[1] Since Trailnet's Motion to Dismiss relies on affidavits and exhibits, the undersigned construes the Motion as one for Summary Judgment. (Check file to see if any other defendants are left in the case or whether they have joined in Motion for Summary Judgment. Defendant Union Electric has been dismissed from the case).

Defendant Missouri Pacific Railroad ("MoPac"), Pacific's successor and part of the Union Pacific Railroad System, provided customer railroad service on the Carondelet Branch until at least 1987. Between 1987 and 1990, the Branch was used for ballast, grain and detour trains. On or about June 1, 1991, Union Pacific determined to proceed with abandonment of the Branch. In early 1992, MoPac filed a notice under 40 C.F.R. 1152.50 seeking exemption from the provisions of 49 U.S.C. §§ 10903 and 10904 for abandonment and discontinuance of operations over 6.2 miles of the Carondelet Branch between mile posts 15.8 and 22.0, which included the portion of the right-of-way across the property in question. A Notice of Exemption was served and published in the federal register on February 28, 1992. The exemption was scheduled to become effective March 29, 1992.

On February 6, 1992, defendant Gateway Trailnet, Inc. ("Trailnet") requested that the ICC issue a Notice of Interim Trail Use or Abandonment ("NITU") pursuant to Interstate Commerce Commisison regulations adopted to implement the provisions of Section 8(d) of the National Trail Systems Act, 16 U.S.C. § 1247(d). MoPac expressed its willingness to negotiate with Trailnet for interim trial use by filing a letter with the ICC on March 2, 1992.

On March 25, 1992, the ICC issued a decision and NITU, docket number AB-3 (sub-no 98X) reopening proceedings and stating that the Notice of Exemption published in the Federal Register on February 28, 1992 was modified to the extent necessary to implement interim trial use/rail banking under 16 U.S.C. § 1247(d). The NITU further stated that if an agreement for interim trail use/rail banking was reached by the 180th day after service of the decision, interim trial use could be implemented, but that if no agreement was reached by that time, MoPac might fully abandon the line, subject to certain conditions.

Thereafter, the ICC granted two extensions of the 180 day negotiation period at the request of the parties, with the final extension expiring on December 31, 1992. On December 30, 1992, MoPac and trailnet entered into a Donation, Purchase and Sale Agreement pursuant to which the railroad contemporaneously executed and delivered a quit claim deed of the aforesaid section of its right-of-way to Trailnet for interim trial use. The Agreement, which by its terms did not merge into the deed and survived the closing and transfer of title, stated that the Agreement and transfer were subject to the provisions of 16 U.S.C. § 1247(d) and the applicable orders of the ICC.

After the transfer of the right-of-way, MoPac removed its rails and ties. Trailnet has made improvements to the right-of-way and continuously maintained it for trail use.

Count I of plaintiff's complaint seeks a declatory judgment regarding the rights of all the parties to the property across which the right-of-way runs.[2] Count II seeks ejectment of defendant Union Electric; UE has been dismissed from the case. Count III seeks ejectment of defendant Gateway Trailnet from the right-of-way.

Standard for Ruling on Summary Judgment

A court may grant summary judgment if the pleadings, admissions, depositions, and affidavits show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The court must view

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[2] Although Grant's Farm Manor is named as a defendant, no specific claim is made against Grant's Farm Manor ("GFM") other than a statement that GFM claims rights to the property south of the railroad right of way. Any potential dispute over the boundary line of the property will be resolved with the following discussion of Trailnet's rights to the right-of-way, which acts as a boundary line between the properties owned by GFM and the plaintiff.

all facts and inferences in the light most favorable to the non-moving party. *Portis v. Folk Constr. Co.*, 694 F.2d 520, 522 (8th Cir. 1982). The burden of proof is on the moving party to show an absence of any genuine issue of material fact. *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 392, (8th Cir. 1986). Once the moving party demonstrates that there is no genuine issue of material fact, the burden shifts to the adverse party to establish a genuine issue for trial. Fed.R.Civ.P. 56(e); *Brown v. Trans World Airlines, Inc.*, 746 F.2d 1354, 1358-59 (8th Cir. 1984).

The Supreme Court has noted that: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action'." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed.R.Civ.P. 1). Thus, the non-moving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita*, 457 U.S. at 586. "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'." *Id.* at 587. The Eighth Circuit has acknowledged that the "trilogy of recent Supreme Court opinions" demonstrates that the courts should be "more hospitable to summary judgments than in the past" and that a motion for summary judgment "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact." *City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Discussion

The main issues in this case are: 1) what legal interest, if any, Pacific Railroad had in the right-of-way on which its rail was constructed; 2) whether that legal interest was

transferable; and 3) whether MoPac abandoned any legal interest it might have had in the property prior to executing the quitclaim deed to Trailnet.

Pacific Railroad's Interest

The undersigned has carefully reviewed the parties' myriad, and sometimes confusing, arguments regarding what type of interest Pacific Railroad gained in the right-of-way when it constructed its Carondelet Branch. Plaintiff contends that the owner's oral grant of a right-of-way on the property created a mere license, revocable at any time. The undersigned disagrees. Pacific Railroad constructed the line at considerable expense pursuant to the owner's permission, thereby creating an easement of estoppel under Missouri law. *Allee v. Kirk,* 602 S.W. 2d 922, 925 (Mo.App. 1980) (citing *Sanford v. Kern,* 223 Mo. 616, 122 S.W. 1051 (1909)). Such an easement may not be revoked like a license. *Allee,* 682 S.W. 2d at 925. As successors of Pacific, defendants MoPac/Union Pacific gained this easement.

Transferability of the Easement

Plaintiff argues that, even if Pacific Railroad had an easement by estoppel, the easement was not transferred from MoPac to Trailnet in the quitclaim deed. However, Missouri law holds that such easements are not extinguished by conveyance. *Allee,* 602 S.W. 2d at 925. Thus, MoPac could transfer any its easement to Trailnet.

Abandonment

Plaintiff next contends that, even if MoPac had an easement by estoppel, it lost that easement when it abandoned the property by ceasing to operate the Carondelet Line in 1988 and/or by initiating abandonment proceedings with the ICC. Thus, plaintiff claims, MoPac had no easement to convey to Trailnet.

Defendant argues that federal law preempts consideration of this question under Missouri law, because the ICC

determines whether abandonment has occurred pursuant to federal statute. The fact that the ICC has exclusive and plenary authority to regulate abandonment of service (*See Chicago v. North Western Transportation Company v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-20, 101 S.Ct. 1124, 1131-32 (1981)) does not, in itself, preempt the consideration of the abandonment issue under state law. "The ICC is concerned only with whether a line is abandoned for interstate commerce purposes. . . . That says nothing about whether a line is actually abandoned for all railroad purposes." *Burlington Northern R.R. Co. v. Kmezich*, 48 F.3d 1047, 1058 (8th Cir. 1995). However, where, as in this case, the ICC retains jurisdiction over a right-of-way by ordering that interim trail use is subject to restoration or reconstruction for railroad purposes, federal law prevails. *Schneider v. Union Pacific Railroad*, 864 F.Supp. 120 (D.Neb. 1994) (federal law preempted state law on question of whether trail use/rail banking agreement was effective to invoke antiabandonment provisions of the NTSA).[3] The National Trails System Act, 16 U.S.C. § 1247(d) provides that when interim trial use is subject to restoration or reconstruction for railroad purposes, such interim trail use shall not be treated, for the purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. Thus, the NTSA precludes a finding that MoPac abandoned its easement. Furthermore, this Court does not have subject matter jurisdiction to consider plaintiff's arguments regarding the propriety of the ICC's order, the ICC's authority in this case, or the applicability of the NTSA. *Glosmeyer v. Missouri-Kansas-Texas Railroad*, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 110 S.Ct.

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[3] In any event, the undersigned does not believe that MoPac abandoned the easement under Missouri law prior to the transfer of the right-of-way to Trailnet. Although no trains ran on the rail subsequent to 1990, MoPac did not remove its rails until after the transfer. *See Kansas City Area Transport Authority v. 4550 Main Associates*, 742 S.W.2d 182, 191 (Mo.App. 1987), *U.S. cert. denied* in 484 U.S. 1063, 108 S.Ct. 1020 (date).

1295 (1990) (federal circuit courts of appeal have exclusive jurisdiction to determine validity of all ICC rules, regulations and final orders); 49 C.F.R. 1152.29(b)(1)(i) ("in every proceeding where a Trails Act request is made, the Commission will determine whether the Trails Act is applicable"). As such, plaintiff's abandonment claim fails.

Since the above discussion resolves the rights of all remaining parties in this case, the undersigned will order the case dismissed as to all defendants.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's Motion for Summary Judgment (# 61) is DENIED.

IT IS FURTHER ORDERED that defendant MoPac's Motion for Summary Judgment (# 42) is GRANTED.

IT IS FURTHER ORDERED that this cause is DISMISSED as to all defendants.

IT IS FURTHER ORDERED that defendant's Motion for Sanctions (# 54) is DENIED.

/s/ Terry I. Adelman
TERRY I. ADELMAN
United States Magistrate Judge

Dated this 13th day of September, 1995

[Filed May 9, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV302 TIA

GRANTWOOD VILLAGE,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter is before the undersigned on plaintiff's Motion for Remand. The parties agreed to try their case before the undersigned pursuant to 28 U.S.C. § 636(c).

Plaintiff originally filed this title action in the Circuit Court of St. Louis County, Missouri, seeking relief under Missouri statutes 527.150 and 527.180. Plaintiff seeks a decree that it is fee-simple owner of certain property.

Defendants removed the case to this Court asserting federal subject matter jurisdiction under the National Trail System Act and the statutory authority of the Interstate Commerce Commission. Plaintiff seeks remand, arguing that the case involves questions of state law and is not properly before this Court.

Discussion

The Missouri Pacific Railroad ("Mo Pac") operated rail services for a number of years on a 100′ right-of-way located in Grantwood Village. On February 10, 1992, Mo Pac filed a Notice of Intent to Abandon with the

Interstate Commerce Commission. On December 30, 1992, Mo Pac transferred interest in the property to defendant Gateway Trailnet, Inc. ("Trailnet"). During the spring and summer of 1993, Mo Pac removed all rails, railroad ties and other improvements from the property. Plaintiff filed suit in state court to quiet title to the property formerly used by Mo Pac.

Plaintiff's complaint asserts that Mo Pac never possessed title to the property, or in the alternative, abandoned any right that it did possess. Plaintiff further contends that when Mo Pac abandoned the property, a fee simple interest reverted to plaintiff. Defendant Trailnet argues that although Mo Pac filed an intent to abandon with the ICC, Mo Pac never abandoned the property but instead transferred its interest to Trailnet.

A pivotal issue in this case is whether MoPac abandoned the property prior to its attempted transfer of interest to Trailnet. The ICC has exclusive and plenary authority to rule on decisions to abandon rail lines. *Chicago & N.W. Trasp. v. Kalo Brick & Tile,* 450 U.S. 311, 101 S.Ct. 1124 (1981). Therefore, the question of whether Mo Pac abandoned the line necessarily involves federal law. *See Winter v. I.C.C.,* 828 F.2d 1320 (8th Cir. 1987) (applying federal law in review of ICC decision regarding abandonment of rail line). As such, federal jurisdiction is appropriate and plaintiff's Motion for Remand will be denied.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's Motion for Remand (#36) is DENIED.

/s/ Terry I. Adelman
TERRY I. ADELMAN
United States Magistrate Judge

Dated this 9th day of May, 1995.

STATUTORY PROVISIONS INVOLVED

Section 524.010 Revised Statutes of Missouri (1994)—Ejectment maintained generally when

> An action for the recovery of the possession of premises may be maintained in all cases where the plaintiff is legally entitled to the possession thereof.

Section 527.150 Revised Statutes of Missouri (1994)—Suits to determine interest and quiet title, how instituted—effect of judgment

> 1. Any person claiming any title, estate or interest in real property, whether the same be legal or equitable, certain or contingent, present or in reversion, or remainder, whether in possession or not, may institute an action against any person or persons having or claiming to have any title, estate or interest in such property, whether in possession or not, to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real property.
>
> 2. And upon the trial of such cause, if same be asked for in the pleadings of either party, the court may hear and finally determine any and all rights, claims, interest, liens and demands, whatsoever of the parties, or of any one of them, concerning or affecting said real property, and may award full and complete relief, whether legal or equitable, to the several parties, and to each of them, as fully and with the same force and effect as the court might or could in any other or different action brought by the parties, or any one of them, to enforce any such right, claim, interest, lien or demand, and the judgment or decree of the court when so rendered shall

be as effectual between the parties thereto as if rendered in any other different or separate action prosecuted therefor.

16 U.S.C. § 1247(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. § 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

28 U.S.C. § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441 Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

* * * *

Supreme Court, U.S.
FILED
JAN 9 1997
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No. 96-931

In The

Supreme Court of the United States

October Term, 1996

GRANTWOOD VILLAGE,

Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, GRANT'S FARM MANOR, INC., and GATEWAY TRAILNET, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company submit that petitioner's statement of the "Question Presented" is overly broad and argumentative and is not related to the circumstances of the case. A more proper statement of the question is:

> Does the Interstate Commerce Commission's authority over railroad abandonments and Rails to Trails conversions preempt a landowner from filing a quiet title suit to establish exclusive title in itself over a former railroad right of way that is the subject of a Rails to Trails conversion order?

LIST OF INTERESTED PARTIES

The caption of the case correctly names all of the parties to the proceeding.[1] Parent companies and non-wholly owned subsidiaries of Union Pacific Railroad Company are:

Union Pacific Corporation (parent company)

Arkansas & Memphis Railway Bridge and Terminal Co.

Automated Monitoring & Control International, Inc.

Portland Terminal Railway Company

Portland Traction Company

St. Joseph & Grand Island Railway Company

Southern Illinois and Missouri Bridge Co.

Texas City Terminal Railway Company

The Alton & Southern Railway Company

The Ogden Union Railway & Depot Co.

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[1] As of January 1, 1997 Missouri Pacific Railroad Company was merged into Union Pacific Railroad Company. Prior to that time Missouri Pacific Railroad Company and Union Pacific Railroad Company were both wholly owned subsidiaries of Union Pacific corporation, and Union Pacific Railroad Company continues as such. This merger has no effect on the issues of this appeal.

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REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS.

Petitioner asserts that the Eighth Circuit's opinion in this case,[2] conflicts with the recent Federal Circuit holding in *Preseault v. United States* (1996 W.L. 647889) (Fed. Cir. Nov. 5, 1996). In fact there is no conflict between the two decisions, as the *Preseault* case is totally consistent with the Eighth Circuit's decision in this case.

In this case the Eighth Circuit Court of Appeals made two key preemption related holdings, both based on the extent of Federal regulation of the field of railroad abandonment. The first was that the Federal regulation of the field was so pervasive as to permit jurisdiction of the District Court under Federal question jurisdiction. 95 F.3d at 657. The second holding affirmed the District Court's decision that controlling federal law precluded it did from deciding the merits of Petitioner's quiet title suit – essentially that the federal regulation of the area preempted consideration of a suit aimed at divesting Respondents of their interests in the property authorized under the Interstate Commerce Commission's Rails to Trails Conversion Order. 95 F.3d at 657-58.

The Federal Circuit in *Preseault* did not contradict either of these holdings. It held that, while the matter

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[2] *Grantwood Village v. Missouri Pacific Railroad Company*, 95 F.3d 354 (8th Cir. 1996).

should be decided under controlling federal law, property owners affected by an I.C.C. Rails to trails Conversion Order could still be entitled to compensation for a "taking" of their state law created property rights. (1996 WL 64889, *2). This in no way conflicts with the Eighth Circuit's decision in this case. It may well be that Petitioner has a right to file for compensation in the Court of Federal Claims as was done by the property owners in the *Preseault* case, at the specific suggestion of this Court in the prior connected *Preseault* proceedings. *Preseault v. I.C.C.*, 494 U.S. 1 (1990).[3] However, the *Preseault* cases clearly do not hold that petitioner in this case is entitled to use a state court proceeding to reacquire the right of way in contravention of the I.C.C.'s Order.

As such, the *Preseault* cases, far from conflicting with the Eighth Circuit's opinion in this case, totally support that decision and lay out the method by which Petitioner should have proceeded in this matter. What Petitioner cannot do is what it attempted to do in this case – wait until after the I.C.C.'s Order was final and then attempt to divest the Respondents of the property interests authorized by that Order by filing a state law quiet title action.

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[3] In *Preseault v. I.C.C., Id.*, property owners challenged the validity of the Rails to Trails Act (16 U.S.C.A. §1247(d)) in an appeal of an I.C.C. Order converting a long unused railroad easement to a trail. This Court upheld the validity of the statute, but went on to hold that this did not preclude the owners from filing a claim with the Court of Federal Claims under the Tucker Act for a "taking". The property owners subsequently filed a Tucker Act claim for compensation which was rejected by the Court of Federal Claims. They appealed to the Federal Circuit, which issued to its recent *Preseault v. United States* decision (relied on by Petitioner in this matter), holding they should be entitled to compensation.

Federal law does not permit consideration of that remedy under the circumstances, and no Circuit Court has held otherwise.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioner also incorrectly asserts that the decision of this Court in *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 116 S. Ct. 1671 (1995), conflicts with the Eighth Circuit's decision in this case. In *Travelers* this Court analyzed the issue of whether a state surcharge on hospital rates in certain situations was preempted by ERISA, a complicated issue of first impression. Petitioner asserts that the particular methodology used by the Court in analyzing the federal preemption issue there was mandatory for lower courts in all preemption cases of every kind. This ignores the fact that this Court has already ruled on the preemptive effect of the I.C.C.'s authority over railroad abandonment issues in several cases,[4] and the Eighth Circuit properly may and did follow those precedents.

This Court's analysis in *Travelers* was not new, merely starting from the point that preemption is not favored in the absence of a clear indication by Congress. This is consistent with the approach the Court has taken historically in preemption cases, including the preemptive effect of the I.C.C.'s authority. See *Chicago & North Western*

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[4] *Preseault v. I.C.C., supra; Chicago & North Western Transportation Co. v. Kalo Brick & Title Co.*, 450 U.S. 311 (1981); *Colorado v. United States*, 271 U.S. 153 (1926).

Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981). The Court did not overrule the prior precedents in the area of I.C.C. preemption of railroad abandonment issues and did not require that the Eighth Circuit reinvent the wheel in an area already settled by this Court. In *Travelers* the issue of exactly how a state surcharge related to employee benefit plans, and whether this relationship was sufficient to require preemption under ERISA was novel and required detailed analysis of the facts to resolve. However, this does not mean that in every case, no matter how many precedents there have been and no matter how clear the preemption issue might be, the same detailed analysis must be entertained.

In this case the issue was much more straight forward. The Eighth Circuit determined that petitioner's suit was an effort to divest Respondents of interests in a rail line conferred on them by an order of the Interstate Commerce Commission. As such the issue of federal preemption was sufficiently settled both in its own circuit and in the rulings of this Court, that there was no need for the Court to go through a further detailed analysis. This Court in *Preseault v. I.C.C.*, 494 U.S. 1 (1990) clearly laid out the overriding Federal interest under the Rails to Trails Act and specified the proper course of relief. The Eighth Circuit opinion is consistent with those guidelines.

III. THERE ARE NO ISSUES OF FEDERALISM WHICH CALL FOR THE DECISION OF THIS COURT.

This case is a simple matter of the Petitioner selecting the wrong remedy. Petitioner attempted in a state quiet

title action to divest the interests of Respondents in an old railroad right-of-way, despite the I.C.C.'s Rails to Trails Conversion Order authorizing those interests. If Petitioner had been successful this would have totally defeated the I.C.C.'s Order. Petitioner may, as in *Preseault v. United States* (1996 W.L. 647889) (Fed. Cir. Nov. 5, 1996), bring a claim for compensation in the Federal Court of Claims, at which time the issue of Petitioner's state law property rights can be litigated as part of a determination of how much compensation, if any, is due and from whom. However, clearly Petitioner cannot try to defeat the I.C.C.'s Order by a quiet title suit, and denial of consideration of that suit under the circumstances does not destroy significant state rights. This Court has already held in *Preseault v. I.C.C., supra,* that the Rails to Trails Act is constitutional subject to possible "taking" claims. No further intrusion into state property rights is at issue in this case.

IV. THERE IS NO OTHER COMPELLING REASON FOR THIS COURT TO GRANT THE WRIT.

The Eighth Circuit did not rest its decision totally on its analysis of the preemption issue. It further held that even if Petitioner's claim was considered on the merits it failed because under state property law there had been no pre-I.C.C. abandonment. 95 F.3d at 659. As such there are other non-preemption grounds on which the decision can be supported.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully Submitted,

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No. 96-931

In The

Supreme Court of the United States

October Term, 1996

GRANTWOOD VILLAGE,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, GRANT'S FARM MANOR, INC., and GATEWAY TRAILNET, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT GATEWAY TRAILNET'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The issue is not, as stated by Petitioner, whether federal regulatory authority preempts state property law as to the abandonment of a railroad's real property interest in a right-of-way, but whether it preempts a landowner's right to recover exclusive use of his property while the Surface Transportation Board (formerly ICC) retains jurisdiction under federal law. The proper question has been authoritatively answered in the affirmative by this Court.

STATEMENT PURSUANT TO RULE 29.6

Respondent Gateway Trailnet, Inc. is neither a parent or subsidiary of any other corporation.

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APPENDIX

Appendix A — Letter from President Grant to C.W. Ford, April 6, 1872 ..... 1a

Appendix B — 49 U.S.C. § 10903 ..... 3a

STATEMENT OF THE CASE

The letter from President Grant to his St. Louis agent, dated April 6, 1872, (not 1874 as stated on page 2 of the Petition for Writ of Certiorari) is set forth in full in the Appendix to this brief.[1] The permission granted in the letter to the railroad for a right-of-way across President Grant's farm in St. Louis County, Missouri, and the railroad's subsequent building of its track pursuant to such permission, gave the railroad an easement under Missouri law. *Maupin v. Chicago R.I.&P. Ry. Co.*, 71 S.W. 334 (Mo. 1890); *Allee v. Kirk*, 602 S.W. 2d 922, 925 (Mo. App. 1980).[2] All issues in this case stem from the fact that the Railroad had only an easement in the right-of-way. Had the railroad owned the fee title to the right-of-way, this case would have never arisen.

The railroad is no longer using the easement. Instead, Gateway Trailnet, Inc. is presently operating a hiking/biking trail on the right-of-way pursuant to a Notice of Interim Trail Use (NITU) issued by the Interstate Commerce Commission (ICC) on March 25, 1992 (App. 33-34). The ICC issued the NITU pursuant to what Petitioner calls the "Rails-to-Trails Statute," 16 U.S.C. § 1247(d). That statute provides that interim trail use

> shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

By such language, the provision expressly preempts state law

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1. A photocopy of the letter is found in the record at App. 229 and is correctly transcribed at App. 212 and in the Appendix.

2. Since the railroad used the right-of-way for almost 120 years, even if President Grant had not consented, the railroad would by 1992 have had an easement by prescription, *i.e.*, by adverse possession.

to the extent that a railroad's easement interest in a right-of-way would otherwise "revert" to the underlying fee owners upon the railroad's abandonment. The interim use preserves the right-of-way for future railroad use when needed, as now determined by the Surface Transportation Board, successor to the ICC.[3] In the statutory scheme of Title 49 U.S.C. § 10903, which is the basic governing statute[4], the railroad is considered to have discontinued operations rather than abandoned the right-of-way. *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 8 (1990).

In 1993, Petitioner filed its lawsuit in state court (Missouri). The state case was originally filed against only the Missouri Pacific Railroad. On January 17, 1994, Gateway Trailnet was served with a Summons and a First Amended Petition joining Gateway Trailnet as a defendant (Supp. App. 08). That First Amended Petition alleged that the Railroad had filed with the Interstate Commerce Commission (ICC) a notice dated February 10, 1992, stating its intention to abandon the right-of-way[5] and that the Petitioner as the fee owner was therefore the owner "by reversion" despite the transfer of the right-of-way by Missouri Pacific to Gateway Trailnet. Petitioner clearly raised the issue of abandonment in the state court.

Gateway Trailnet filed a timely notice of removal (App.

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3. *See* ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803, 823.

4. Petitioner did not include this key statute in its Appendix. We have therefore included it in ours.

5. The system followed under the Rails-to-Trails statute is typically that after the railroad files its notice with the ICC (now Surface Transportation Board) the prospective trails organization files its application for an order or notice authorizing interim trail use. *See* opinion of the Eighth Circuit appended to the Petition for Writ of Certiorari, at p. 3a.

13; Supp. App. 1) in the District Court for the Eastern District of Missouri. The notice cites both the federal law which controls and preempts the abandonment of railroad rights-of-way and the "Rails-to-Trails" statute 16 U.S.C. § 1247(d) under which Gateway Trailnet had been afforded the right of interim trail use.

In the District Court the Petitioner made the same contention it is making here that "under state law, whatever interest MoPac had in the property had been abandoned before the 1992 ICC proceeding" (p. 2 of Petition for Writ), and that therefore MoPac had nothing to hand over to Gateway Trailnet. The District Court overruled Petitioner's motion for remand and granted summary judgment dismissing Petitioner's cause. The Court of Appeals for the Eighth Circuit affirmed. The orders and opinions below are contained in the appendix to the Petition for Writ.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED BY PETITIONER IS MISCONCEIVED; THE PROPER QUESTION HAS ALREADY BEEN AUTHORITATIVELY *ANSWERED BY THIS COURT.*

The extremely broad "question presented" by Petitioner, *i.e.*, whether the federal regulatory scheme affecting railroad rights-of-way preempts state property law (*see* p.1 of Petition for Writ) is not one on which the opinion of the Eighth Circuit is in conflict with any other circuit. The Supreme Court has in *Preseault v. Interstate Commerce Commission, supra*, already resolved the key issue of federal/state authority as to rights-of-way subject to Rails-to-Trails orders of the ICC. The proper question of whether federal law preempts landowners' attempts

to reassert their rights because trains are no longer running was authoritatively answered in that case.

In *Preseault*, the Supreme Court put its seal of approval on the "Rails to Trails Statute." The decision was unanimous, with three justices filing a concurring opinion. The Court referred the plaintiffs to the Court of Federal Claims for redress based on their state law property rights as affected by the federal regulatory authority which Congress had authorized and the Court upheld.[6] The plaintiffs then appealed to the Court of Federal Claims, which denied their claim on various grounds. On appeal, the Federal Circuit reversed and held that the claim for damages should be allowed against the United States, remanding the case to the Court of Federal Claims for determination of just compensation. *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

Nothing in any of the *Preseault* litigation is in conflict with what the Eighth Circuit held in this case. The Eighth Circuit opinion was guided and informed by the Supreme Court's opinion in *Preseault*, which in fact followed the reasoning of the Eighth Circuit's previous decision in *Glosemeyer v. Missouri-Kansas-Texas Railroad*, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990). The Eighth Circuit holding in

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6 Three of the nine justices who had joined in the unanimous opinion (O'Connor, Scalia and Kennedy) filed a separate, concurring opinion written by Justice O'Connor. The purpose of the opinion was to quarrel with the reasoning of the Second Circuit that, no matter what Vermont law might provide, the ICC's actions prevented assertion of the landowner's reversionary interest. The concurring opinion is based on (1) the proposition that state law must control property rights and (2) the logic that if there is no reversionary right under state law the court's long discussion of the Tucker Act is unnecessary. The result seen by the concurring justices is that federal preemption may delay the property owner's enjoyment of their interests, but does not affect their "vesting," and leaves them with a claim that the continuing trail use is a compensable taking.

this case is also consistent with the recent decision of the Federal Circuit in *Preseault, supra.*

The Eighth Circuit did not hold what Petitioner says it did, *i.e.*, that federal regulation of railroad abandonment preempts state law governing title to real estate. The very essence of the *Preseault* decisions in both the Supreme Court and the Federal Circuit is to the contrary. Under the jurisprudence established by the *Preseault* decision of the Supreme Court, *supra*, and the *Preseault* decision of the Federal Circuit, *supra*, once the ICC grants the NITU, the issue of whether there is abandonment or excessive use *under state law* becomes solely a compensation claim against the United States to be determined in the Court of Federal Claims. The decision of the Eighth Circuit in the instant case is not in conflict with the *Preseault* cases.

The Petitioner's effort in this case, in both the state court and the federal district court, was not so much to determine title as to oust Gateway Trailnet. In its "Second Amended Petition" filed in the District Court (App. 163), it even added a count in ejectment. Under the federal regulatory scheme, as delineated in the two *Preseault* cases, Petitioner is not entitled to ejectment, although it may, under the most recent *Preseault* decision of the Federal Circuit, be entitled to damages from the federal government for a regulatory taking.[7]

Petitioner sets great store for its claim of conflict (Petition for Writ, p. 9) on the sentence of the Eighth Circuit's opinion (Appendix to Petition for Writ, p. 9a) that "state law claims can only be brought *after* the ICC has authorized an abandonment . . . ." [Emphasis the Court's.] This sentence must be read in

7. Or it may not be so entitled. The decision of the Federal Circuit turned principally on the fact that the tracks had been torn up long before the Rails-to-Trails order. Here the tracks were taken up after the transfer to Gateway Trailnet. *See* opinion, Appendix to Petition for Writ, p. 13a.

the light of the Petitioner's pleaded objective of ousting Gateway Trailnet. The sentence does not mean that claims for compensation in the Court of Federal Claims based on property rights under state law as approved in the Supreme Court's decision in *Preseault*, *supra*, or the Eighth Circuit's previous decision in *Glosemeyer*, *supra*, could not be made in a proper case.

The two *Preseault* decisions by the Supreme Court and the Federal Circuit, respectively, make it clear that the regulatory scheme under Title 49 U.S.C. § 10903 and Title 16 U.S.C. § 1247(d) does not affect title under state law but that the effect of extending the life of the easement to provide interim trail use is a regulatory taking for which compensation from the United States is justified. The decision of the Eighth Circuit which Petitioner would now have this Court review is entirely within the framework of the two statutes and the two *Preseault* decisions. The Petition for Writ of Certiorari should be denied.

II.

THERE ARE NO STATE ISSUES TO BE DETERMINED.

Late in its Petition for Writ of Certiorari (pp. 17 and 18), Petitioner complains that if the state case had not been removed to federal court, the Missouri court would have considered the claim that the right-of-way actually occupied only fifteen to twenty feet of the property claimed. As a result of the removal, Petitioner complains, it "has no means of establishing the boundaries of the railroad's right-of-way that has been banked and put to interim use as a trail." This issue comes up too late. The state case pleaded no such issue (Supp. App. 08). Neither did the extensive First Amended Petition filed in the District

Court, which alleged a 100 foot right-of-way (App. 68).[8] Petitioner could have raised the issue before the ICC but did not intervene to do so. The Eighth Circuit correctly ruled that Petitioner's failure to appeal the decision of the ICC to the Court of Appeals forecloses issues which could have been decided by the Commission. There is no issue here demanding consideration by the Supreme Court. There is no question of federal preemption.

Moreover, it is unlikely that the Missouri courts would have taken jurisdiction even if no removal had been filed. In *Kansas City Area Transportation Authority v. Ashley*, 55 S.W. 2d 9 (Mo. *en banc* 1977), the Supreme Court of Missouri refused to take jurisdiction as to the abandonment issue in a case where, although rail service had ended and the tracks been torn up, the ICC still had jurisdiction under 49 U.S.C. § 10903.[9] This is exactly what the Supreme Court of Vermont did in the *Preseault* case. *See Trustees of the Diocese of Vermont v. State of Vermont*, 496 A.2d 151 (Vt. 1985) involving the *Preseault* facts.[10] The preemption question which Petitioner seeks to raise was settled in Missouri law by the Supreme Court of Missouri in 1977.

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8. In fact, Petitioner pleaded repeatedly the existence of a 100 foot right-of-way. The First Amended Petition filed in the District Court attached copies of all the deeds by which Petitioner claims fee ownership. (App. 102-22). Each deed either refers to the plat of Grantwood Terrace, a subdivision, or to the boundary of the 100 foot right-of-way. The plats of Grantwood Terrace all show the MISSOURI PACIFIC 100' RIGHT-OF-WAY. *See* App. 101, 125, and 137.

9. *See also Mobile & Gulf Railroad Co. v. Crocker*, 455 So. 2d 829 (Ala. 1984) where the Alabama Supreme Court held the same way, citing the Missouri decision.

10. It was only after this decision by the Vermont court that the State of Vermont sought and received a rails-to-trails conversion order from the ICC. *See Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 9 (1990).

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit in this case is not in conflict with any opinion of this Court or with the opinion of any other United States court of appeals on the same important matter. Neither does the opinion conflict with any decision of the Supreme Court of Missouri. Nothing in the opinion below calls for the exercise of this Court's supervisory power. The issues in this case have previously been decided conclusively by this Court. No established rule of law has been misapplied. The Petition for Writ of Certiorari therefore should be denied.

Respectfully submitted,

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APPENDIX A — LETTER FROM PRESIDENT GRANT TO C.W. FORD, APRIL 6, 1872

Executive Mansion
Washington, D.C. Apl. 6th 1872

Dear Ford:

I am in receipt of your letter in which you say that Dr. Steinhaur demands large damages from the railroad for running through his place. I am sorry to hear this for I know of no land that will be benefitted more by the road than his. Probably Judge Long might have influence with him. For my own part I proposed as soon as the road was spoken of to give the right-of-way wherever my land was touched, both on the farm and near Carondelet, and to give five acres off the farm for a depot. Since that [sic], at the suggestion of Mr. Hays, I agreed to make the depot grounds twenty acres, but to be sold in lots one half the proceeds to come to me, the other to go to the road. You are at liberty to state this to Mr. Peirce.

Yours Truly

U.S. Grant

The affidavits of Professor John Y. Simon (App. 259) and Mark Cedeck (App. 232) establish the connecting facts about both the addressee of the letter and the Mr. "Hays" and Mr. Peirce whose names are mentioned in it. The addressee, Charles W. Ford, was President Grant's friend and agent in St. Louis. Other letters cited in the affidavit establish that Ford handled a broad range of business and personal matters for Grant in St. Louis during Grant's presidency, including matters concerning Grant's property in Carondelet and his farm in St. Louis County.

Appendix A

Mr. Cedeck's affidavit establishes that Frances B. Hayes and Andrew Peirce, Jr. were, in 1872, directors of the Pacific Railroad Company and colleagues of Joseph Seligman, a noted railroad financier of the day. Grant's letter to Ford mentions a discussion with "Hays"[1] and encourages Ford to discuss Grant's intentions with Peirce. Mr. Cedeck's affidavit further ties Peirce to this particular project by quoting a letter from Seligman to Peirce advising him to route the Carondelet Branch of the Pacific Railroad through Grant's farm in accordance with previous discussions between Seligman and Grant. The railroad was in fact built on this right-of-way in 1872.[2] Apparently the plan for a depot mentioned in Grant's letter never materialized.

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1. The same misspelling of Hayes' name occurs in Poor's *Railroad Manual for 1872-73*, submitted under the Affidavit of Mark Cedeck, at page 568 (App. 258).

2. See statement in *Poor's Manual of the Railroads For 1872-73*, submitted under the Affidavit of Mark Cedeck, at page 565 (App. 255).

APPENDIX B — 49 U.S.C. § 10903

§ 10903 Authorizing abandonment and discontinuance of railroad lines and rail transportation

> (a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may —
>
> (1) abandon any part of its railroad lines; or
>
> (2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural or community development.

> *Note:* Above is the form of § 10903 as it existed when the facts of this case occurred, before it was amended by the ICC Termination Act of 1995. The 1995 act amended § 10903 to read as follows:

§ 10903. Filing and procedure for application to abandon or discontinue

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to —

> (A) abandon any part of its railroad lines, or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

Supreme Court, U. S.
FILED
FEB 4 1997
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No. 96-931

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GRANTWOOD VILLAGE,
Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
GRANT'S FARM MANOR, INC., and
GATEWAY TRAILNET, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF FOR THE PETITIONER GRANTWOOD VILLAGE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF FOR THE PETITIONER GRANTWOOD VILLAGE

Pursuant to Rule 15.8 of the Rules of this Court, petitioner Grantwood Village submits this supplemental brief to inform the Court of actions taken by the State of Vermont and by the United States in a directly related case.

1. Grantwood Village sought review of the judgment of the Court of Appeals for the Eighth Circuit on December 9, 1996. In its petition, Grantwood Village explained that the Eighth Circuit's decision conflicts directly with an en banc decision of the Court of Appeals for the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). Pet. 9-13.

2. On January 23, 1997, the State of Vermont requested a 30-day extension of time within which to file a petition for a writ of certiorari to review the Federal Circuit's *Preseault* judgment. A copy of this application is included as an appendix to this brief. Supp. App. 1a-5a.

3. On January 24, 1997, the United States filed an application for a 30-day extension of time within which to file a petition for a writ of certiorari to review the Federal Circuit's *Preseault* judgment. A copy of this application is included as an appendix to this brief. Supp. App. 6a-10a. The United States sought the extension on the ground that the Surface Transportation Board (the successor to the Interstate Commerce Commission) had recommended filing a petition and that further consultations within the government required additional time. *Id.* at 9a-10a.

4. This Court granted the applications of the State of Vermont and of the United States on January 27, 1997. The time for the State of Vermont and the United States to file a petition for writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit will now expire on March 5, 1997.

5. In its application, Vermont states that the *Preseault* case "presents the question whether analysis of the respective property rights of the railroad and abutting landowners necessarily must take into account federal law and the influence of federal law on state law." Supp. App. 4a. This statement confirms petitioner's contention that the decisions of the Eighth Circuit and the Federal Circuit present in common the question whether federal law preempts state law. Vermont's assertion that the Federal Circuit's "analysis of the respective property rights of the railroad and abutting landowners under common law principles alone is gravely flawed by its artificial exclusion of the impact of a pervasive federal regulatory scheme" demonstrates that the Federal Circuit, in direct contrast to the Eighth Circuit, refused to hold that federal railroad law preempted state real property law.

6. The application of the United States also reinforces petitioner's contention that the decisions of the two courts of appeals are in direct confict on the question whether federal law preempts state law property rights in land used as a railroad right-of-way. Supp. 6a-10a.

7. The applications of the United States and Vermont support petitioner's position that, whether the question arises in the context of a takings claim, as in *Preseault*, or in a quiet title action to define the nature and boundaries of competing claims to property, as in *Grantwood Village*, the central question is the same. Does federal or state law determine the ownership of real property subject to ICC (now STB) jurisdiction?

Respectfully submitted,

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February 4, 1997

APPENDIX

APPENDIX

APPENDIX

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1996

No. 97——

STATE OF VERMONT, APPLICANT

v.

J. PAUL PRESEAULT, *et. al.*

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Applicant State of Vermont requests a 30-day extension of time, to and including March 6, 1997, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for Federal Circuit in this case. The judgment was entered on November 5, 1996. Unless extended, the time for filing a petition for a writ of certiorari will expire on February 4, 1997. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). A copy of the opinion of the court of appeals is attached.

This case, the sequel to *Preseault v. ICC*, 494 U.S. 1 (1990), involves a claim by J. Paul Preseault and Patricia A. Preseault (the "Preseaults") that they are entitled to compensation because they own property that was taken

in violation of the Fifth Amendment as a result of public trail use of a railroad corridor which bisects their land in Burlington, Vermont, while the corridor is held for future rail use. The original parties to the case in the United States Court of Federal Claims (the "Claims Court") were the Preseaults, plaintiffs, and the United States (the "Government"), defendant. The State of Vermont (the "State"), claiming an interest in the properties involved because of its acquisition of the railroad in 1964, intervened and, under the joinder rules of the Claims Court, entered its appearance as a co-defendant.

In its threshold decision, *Preseault v. United States*, 24 Cl.Ct. 818 (1992), the Claims Court, analyzing Vermont property law alone, without any reference to federal law or the influence of federal law on Vermont property law, granted the Preseaults' motion for partial summary judgment and denied the cross-motions of the State and the United States for summary judgment, agreeing with the Preseaults that they currently possessed a compensable property interest. In its second decision, however, the Claims Court, after considering the effects of longstanding, pervasive federal regulation of the railroad industry that antedated the Preseaults' acquisition of their present property interests, dismissed the Preseaults' claim on its merits, holding that no taking of the Preseaults' property resulted from the presence of the trail. *Preseault v. United States*, 27 Fed.Cl. 69 (1992).

The Preseaults appealed the Claims Court's dismissal of their complaint to the United States Court of Appeals for the Federal Circuit. The State then cross-appealed from the Claims Court's earlier decision on the threshold issue of whether the Preseaults currently possessed a compensable property interest. The United States joined in the arguments made by the State in its cross-appeal and responded to the arguments made by the Preseaults in their appeal. The appeal initially was heard by a three-judge panel which agreed with the Claims Court's second

decision and affirmed dismissal of the Preseaults' complaint. *Preseault v. United States,* 66 F.3d 1167 (Fed. Cir. 1995). The panel majority determined that in 1979, when the Preseaults acquired the first of their current interests, any reversionary interests already were circumscribed by the Interstate Commerce Commission's long-standing authority—established by the Transportation Act of 1920 [1] and reformulated by the 4-R Act of 1976—to permit railroads to discontinue service without abandoning their lines. The panel majority acknowledged that enactment of the 1920 Act may have diminished the value of servient estates underlying the railroad, but found that any taking claim based on this dimension belonged to the 1920 owners, not to their successors, who acquired after the additional obstacle to reversion had been established. The panel majority did not address whether Vermont law would have allowed the State to retain possession had the ICC granted the Preseaults' abandonment petition.

Subsequently, the full court, on its own motion, vacated the panel decision, granted rehearing *en banc,* and ordered additional briefing and argument. *Preseault v. United States,* 66 F.3d 1190 (Fed.Cir. 1995). The *en banc* decision reversed, holding that a property right had been taken from the Preseaults and that they are entitled to compensation from the United States. *Preseault v. United States,* 100 F.3d 1525 (Fed.Cir. 1996). The four-judge plurality opinion provided alternative grounds to support its conclusion that there had been a taking from the Preseaults. First, based on its analysis of the facts and Vermont law, it held that the original railroad had acquired easements for railroad purposes which were not broad enough to encompass railbanking and interim trail use. Secondly, it held that under Vermont law, considered without reference to federal jurisdiction over railroad

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[1] See Ch. 91, § 402, 41 Stat. 474, 477-78 (amending Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379).

abandonments, the railroad easements would have been deemed abandoned prior to railbanking and establishment of interim trail use under federal law. In either situation, the plurality opinion held that the Preseaults had a property interest that was taken when railbanking and interim trail use under federal jurisdiction precluded reversion of the easement under Vermont law. Accordingly, the case was remanded to the Claims Court to determine the amount of compensation to which the Preseaults are entitled. Two judges filed a concurring opinion. Three judges dissented, rejecting the interpretation of Vermont law contained in the plurality and concurring opinions and arguing that the railroad easements had never been abandoned and were broad enough to encompass trail use.

This case presents at least two important issues. First, because the railroad from its inception in 1899 was an instrumentality of interstate commerce subject to Commerce Clause regulation, it presents the question whether analysis of the respective property rights of the railroad and abutting landowners necessarily must take into account federal law and the influence of federal law on state law. Secondly, it presents the question whether the application of the ICC orders extended or expanded the State's rights in the subject railroad corridor beyond the relevant limits that trigger a takings claim. In the State's view, the *en banc* plurality's analysis of the respective property rights of the railroad and abutting landowners under common law principles alone is gravely flawed by its artificial exclusion of the impact of a pervasive federal regulatory scheme upon which the State and other parties have relied. Moreover, the *en banc* plurality's analysis of background Vermont law substantially departs from the accepted and usual course of judicial proceedings by refusing to acknowledge that Vermont law equates highway and railroad use and broadly defines such use to encompass other public uses.

The Vermont Attorney General's Office is considering whether to file a petition for a writ of certiorari seeking

review of the court of appeals' decision. The additional time is needed to complete consultation with the United States, the Vermont Agency of Transportation, the City of Burlington and Vermont Railway, Inc. regarding the significance of the decision; to assess the decision's practical impact on the ability of the State of Vermont to carry forward with its railroad and rail corridor preservation programs; and, if it is decided to proceed with filing a petition, to prepare and print the petition.

Respectfully submitted,

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January 23, 1997

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1996

No. A-96-531

UNITED STATES OF AMERICA, APPLICANT

v.

J. PAUL PRESEAULT and PATRICIA PRESEAULT,
individually and as Partners of 985 Associates, Ltd.,
a Vermont Limited Partnership, and
985 ASSOCIATES, LTD.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Acting Solicitor General, on behalf of the United States of America, respectfully requests a 30-day extension of time, to and including March 5, 1997, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The judgment of the court of appeals was entered on November 5, 1996. Unless extended, the time for filing a petition for a writ of certiorari will expire on February 3, 1997. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case involves a Fifth Amendment claim for just compensation arising out of the use of a railroad right-of-way as a trail for pedestrians and cyclists while it is held for future rail use. J. Paul Preseault, Patricia Preseault and 985 Associates (collectively, the Preseaults) claim reversionary interests in the disputed right-of-way. In 1981, the Preseaults brought a state-court quiet-title action against the State of Vermont. They alleged that the State, which had purchased the right-of-way in 1964, owned only easements across their property and that those easements had been abandoned under controlling principles of state property law. The Vermont Supreme Court determined, however, that Vermont courts lacked jurisdiction to decide the title dispute because the Interstate Commerce Commission (ICC) had not authorized abandonment of the right-of-way. See *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 515, 496 A.2d 151, 153 (1985). The court relied upon this Court's decision in *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981), which held that Congress has given the ICC plenary and exclusive authority to regulate the abandonment of rail lines in interstate commerce.

2. Following the Vermont Supreme Court's decision, the Preseaults applied to the ICC for a certificate of abandonment that would have ended the ICC's protective jurisdiction over the disputed right-of-way. Vermont opposed that request and applied to the ICC for authorization to preserve its right-of-way in discontinued status as part of the interstate rail system. The State invoked Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), which provides for railbanking and interim trail use of out-of-service rail lines. In January 1986, the ICC granted Vermont's Section 8(d) request and denied the Preseaults' request for a certificate of abandonment.[1]

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[1] See *Vermont & Vermont Ry.—Discontinuance*, 51 Fed. Reg. 454 (1986) (notice that Vermont had satisfied requirements for dis-

The Preseaults petitioned to the Second Circuit for review of the ICC's action, arguing that Section 8(d) of the Trails Act exceeds the scope of Congress's authority under the Commerce Clause and violates the Fifth Amendment's prohibition against uncompensated takings. The court of appeals rejected those claims, ruling that Section 8(d) bore the required connection to interstate commerce and that railbanking and interim trail use of out-of-service rights-of-way did not effect a taking of any reversionary interests. *Preseault* v. *ICC*, 853 F.2d 151 (2nd Cir. 1988).

This Court granted certiorari and affirmed. 494 U.S. 1 (1990). The Court found that Section 8(d) served "valid congressional objectives," and it therefore affirmed the Second Circuit's rejection of the Commerce Clause challenge. *Id.* at 18. The Court also found that Section 8(d) did not violate the Fifth Amendment, although its reasoning on that issue differed from the court of appeals'. The Fifth Amendment could not serve as a basis for invalidating ICC actions under Section 8(d), the Court determined, because any landowner who suffered a taking could obtain just compensation in a Tucker Act suit against the United States. *Id.* at 11-17.

3. In 1990, the Preseaults filed the current Tucker Act suit in the Claims Court, now known as the Court of Federal Claims (CFC). Vermont intervened to protect its interests in the right-of-way. The CFC determined that the right-of-way across the Preseaults' property rested on easements and that those easements would have expired, under state-law principles, in 1975 when the State allowed track to be removed from the relevant portion of its right-of-way. 24 Cl. Ct. 818, 833-836 (1992). In a second opinion, however, which addressed the effect of federal

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continuance and interim trail use), consolidated with *Trustees of the Diocese of Vermont* v. *State of Vermont & Vermont Ry., Inc.*, Finance No. 30702 (abandonment request), recon. denied, 3 I.C.C. 2d 903 (1987).

railroad law, the CFC determined that federal restrictions on the abandonment of rail rights-of-way, in place when the Preseaults acquired their current interests, would have allowed Vermont to retain its easements. 27 Fed. Cl. 69, 92-94 (1992). The CFC found that those federal limitations on the reversionary interests that the Preseaults acquired were sufficient to defeat their taking claim.

4. The court of appeals, after vacating an initial panel decision to affirm the CFC (originally reported at 66 F.3d 1167 (Fed. Cir. 1995)), reheard the case in banc and reversed. A six-judge majority, divided between plurality and concurring opinions, voted to reverse the CFC's judgment and remand for determination of the compensation owed by the United States. 100 F.3d 1525 (Fed. Cir. 1996). The four-judge plurality found that Vermont possessed only easements across the Preseaults' property; that those easements had terminated, under state law principles, in 1975; and that the ICC's subsequent authorization of railbanking and interim trail use in 1986 constituted a taking of the Preseaults' property by reviving the State's easements and expanding them to include uses that the relevant state law would not have allowed. The two concurring judges reached the same result on related grounds, but did not join the plurality opinion. *Id.* at 1552-1554.

Three judges dissented. *Id.* at 1554-1576. Vermont law, in their view, would have allowed the State to remain in possession of the right-of-way and to open the right-of-way to interim trail use even if the ICC had terminated its protective jurisdiction. The dissenters would therefore have denied the Preseaults' Tucker Act claim.

5. The Surface Transportation Board, which is the successor to the ICC, has recently recommended to the Acting Solicitor General that the United States file a petition for certiorari in this case. Additional time is re-

quired for further consultations within the government concerning that request, and for preparation and printing of the petition in the event that one is authorized. We therefore request a 30-day extension of time, to and including March 5, 1997, within which to file a petition for a writ of certiorari.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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